



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 25, 1996

Ms. Susan E. Tennyson
Supervising Attorney
Litigation Section
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR96-1007

Dear Ms. Tennyson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100111.

The Texas Department of Health (the "department") received a request for "copies of the establishment inspection reports written about the Air Liquide Company as a result of the March 13, 1996 oxygen contamination incident at the Olin E. Teague Veterans Center, Temple, Texas." You contend that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code, and you have submitted the information to us for review.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 5705 of Title 38 of the United States Code provides, in part:

(a) Records and documents created by the Department [of Veterans Affairs] as part of a medical quality-assurance program . . . are confidential and privileged and may not be disclosed to any person or entity except as provided in subsection (b) of this section.

(b)(1) Subject to paragraph (2) of this subsection, a record or document described in subsection (a) of this section shall, upon request, be disclosed as follows:

...

(C) To a criminal or civil law enforcement governmental agency or instrumentality charged under applicable law with the protection of the public health or safety

...

(3) No person or entity to whom a record or document has been disclosed under this subsection shall make further disclosure of such record or document except for a purpose provided in this subsection.

You state that some of the information contained in the requested documents was provided to the department by the Department of Veteran Affairs. Title 38 of the United States Code section 5705(b)(1)(C) apparently governs the release of such information. The department is expressly prohibited from releasing such information unless it is for a purpose provided by that subsection. Release of this information to this requestor does not appear to be for one of the purposes provided by that subsection. Therefore, the department must withhold from disclosure the information obtained from the Department of Veteran Affairs because it is confidential under federal law.


To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. This office considers contested cases conducted under the Administrative Procedure Act, Government Code chapter 2001, to be litigation under section 552.103(a). Open Records Decision No. 588 (1991) at 7. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You state that both the department and the U.S. Food and Drug Administration are currently investigating the incident that is the subject of the request for information, and that the department anticipates that "administrative enforcement action will occur as a result of this incident." You have shown that litigation is reasonably anticipated and that all of the requested information relates to the anticipated litigation. Therefore, the department may withhold all of the requested information under section 552.103(a) of the Government Code.¹

¹We note that once all parties to the anticipated litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable. Open Records

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 100111

Enclosures: Submitted documents

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(w/o enclosures)